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No. 1199.

In the Supreme Court of the United States

OCTOBER TERM, 1968

FRANK AURELI,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

To The Honorable, The Chief Justice and The Associate Judges of The Supreme Court of The United States:

The petitioner, Frank Aureli, prays that a Writ of Certiorari issue to review the decision of the Appellate Court of Illinois, First District, reversing an order suppressing evidence, on appeal by the People of the State of Illinois pursuant to the provisions of Chapter 110A, Section 604(a), Illinois Revised Statutes (Illinois Supreme Court Rule 604).

OPINION OF THE COURT BELOW

The opinion of the Illinois Appellate Court, First District, entered September 12, 1968, is reported at 99 Ill. App. 2d 349; 241 N.E. 2d 694, and is reprinted herein in the printed appendix and in the record filed simultaneously herewith, and certified by the Clerk of the Illinois Appellate Court, First District.

The Petition for Rehearing was denied on October 24, 1968, and the Order Denying said Petition is set forth in the certified copy of the record.

The Supreme Court of Illinois denied a Petition for Leave to Appeal without opinion on January 27, 1969. The Order denying said Petition for Leave to Appeal is set forth in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the Illinois Appellate Court, First District, was entered on September 12, 1968, reversing the judgment of the Circuit Court of Cook County, Illinois. On the 24th day of October, 1968, it was ordered by that Court that the Petition for Rehearing be denied.

A Petition for Leave to Appal in the Supreme Court of Illinois was denied on January 27, 1969. This Petition for a Writ of Certiorari is filed within ninety (90) days from said January 27, 1969.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Is not a warrant to search premises for "records of racehorse bets, scratch sheets, miscellaneous gambling paraphernalia, or any evidence thereof," without stating any basis in the complaint for the warrant to support a reasonable belief that such items and things were on the premises, a general warrant prohibited by law?

2. May hearsay received from two anonymous informers be considered corroborative one of the other, when there is no basis for believing either one?

3. Will a warrant properly issue on hearsay information from anonymous sources to a person not charged with enforcing the law claimed to be violated?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment to the Constitution of the United States

"AMENDMENT IV—SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment to the Constitution of the United States

"AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

Article 2, Section 6, Constitution State of Illinois

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.

Chapter 38, Section 28-3, Illinois Revised Statutes

A "gambling place" is any real estate, vehicle, boat or any other property whatsoever used for the purposes of gambling. Any person who knowingly permits any premises or property owned or occupied by him or under his control to be used as a gambling place shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. For each subsequent conviction, such person shall be fined not to exceed $1,000 or imprisoned in the penitentiary from one to 3 years, or both.

Chapter 38, Section 28-1, Illinois Revised Statutes

(a) A person commits gambling when he:

* * *

(5) Knowingly owns or possesses any book, instrument or apparatus by means of which bets or wagers have been, or are recorded or registered, or knowingly possesses any

money which he has received in the course of a bet or wager; or

* * *

(10) Knowingly transmits information as to wagers, betting odds, or changes in betting odds by telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information; except that nothing in this subdivision (10) prohibits transmission or receipt of such information for use in news reporting of sporting events or contests.

Chapter 110A, Section 604(a), Illinois Revised Statutes

(a) *When State May Appeal.* In criminal cases the state may appeal only from an order or judgment, the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114—1 of the Code of Criminal Procedure of 1963; arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence.

STATEMENT OF THE CASE

This action began by the filing of an indictment against this petitioner, charging the offenses of keeping a gambling place, operating, keeping, owning, using, exhibiting, selling, and distributing gambling devices, possession of books, instruments and apparatus by which bets and wagers are made, recorded and registered, and transmitting information as to wagers, betting odds, and changes in betting odds by telephone, in violation of Chapter 38, Section 28-3, 28-1(a-3), 28-1(a-5), and 28-1(a-10) of the Illinois Revised Statutes respectively.

A Motion to Suppress the Evidence obtained as a result of the search pursuant to warrant, was filed by this petitioner. That warrant issued on the complaint of one Dun-

can J. Everette, who identified himself as an agent of the Federal Bureau of Investigation, and swore he had reasonable cause to believe that "records of racehorse bets, scratch sheets, miscellaneous gambling paraphernalia, or any evidence thereof" were located on the premises of 6949 West Grand Avenue.

The basis on which he bottomed his reasonable cause to believe those articles were on the described premises is set out *in toto* as follows:

> "Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the premises set forth above:
>
> "On June 22, 1966 and July 25, 1966, two informers, who have furnished reliable information to me in the past concerning gambling matters, told me that they have recently called race horse bets in to Chicago telephone 889-7272 and placed their bets with a man who answered on the other end. These informers said they called this number on June 22, 1966, June 28, 1966, July 14, 1966, July 21, 1966 and July 25, 1966. These informers furnished this information separately, and neither informer knows the identity of the other as an informer.
>
> "I determined the records of the Illinois Bell Telephone Company, Chicago, Illinois, lists telephone 889-7272 to Sam Golden, 6949 West Grand Avenue, Chicago, Illinois.
>
> "On July 15, 1966, from personal observation of the address 6949 West Grand Avenue, Chicago, Illinois, at 10:55 a.m. I observed Frank Aureli enter this address.
>
> "On July 19, 1966, I personally observed Frank Aureli at 10:44 a.m. walking from a western direction on West Grand Avenue, Chicago, Illinois, to the address of 6949 West Grand Avenue, Chicago, Illinois, which address he entered.

"On July 25, 1966, I personally observed Frank Aureli arrive in the vicinity of 6949 West Grand Avenue, Chicago, Illinois, at 11:03 a.m. from a Western direction in a late model light blue Buick automobile bearing 1966 Illinois license 848-251, which automobile was being driven by an unknown male individual. Frank Aureli was observed to exit this automobile and enter the H & F Restaurant located a few doors east of the address 6949 West Grand Avenue, Chicago, Illinois. At 11:08 a.m. on this date Frank Aureli was observed to exit this restaurant, walk to and enter the address 6949 West Grand Avenue, Chicago, Illinois.

"The records of the Secretary of State, State of Illinois, reveal that 1966 Illinois license 848-251 is registered to Peter Klappas, 1343 Cavell, Highland Park, Illinois.

"On July 25, 1966, at 5:13 p.m. Frank Aureli was observed to leave the address 6949 West Grand Avenue, Chicago, Illinois, walk east to the nearest bus stop where he boarded CTA electric bus number 9629 at 5:27 p.m. At 5:38 p.m. Frank Aureli was observed to exit this electric bus at Grand Avenue and Central Avenue, Chicago, Illinois, cross Central Avenue in a northerly direction, and climb the stairs to the level of the Central Avenue bridge overpass. At 5:45 p.m. Frank Aureli boarded CTA electric bus number 9712 on the Central Avenue bridge overpass and subsequently exited this bus when it arrived at Central Avenue and Madison Street, Chicago, Illinois at 5:58 p.m.

"On July 26, 1966, at 11:15 a.m. Frank Aureli was observed to arrive in a Yellow cab on the northeast corner of Grand Avenue and Sayre Street, Chicago, Illinois and subsequently cross Grand Avenue, walk directly to and enter 6949 West Grand Avenue, Chicago, Illinois.

"On July 27, 1966, at 5:27 p.m. Frank Aureli was observed to leave the address 6949 West Grand Avenue, Chicago, Illinois and walk west on West Grand Avenue.

"The Federal Bureau of Investigation identification record for Frank Aureli under FBI number 1,466,445 dated May 13, 1965, disclose, among other items, submission of fingerprints by the Chicago, Illinois Police Department on charges of gambling and bookmaking on June 15, 1961, November 3, 1961, January 3, 1964, January 8, 1964, November 11, 1964, and March 8, 1965."

Th trial judge granted the motion to quash the warrant and suppress the evidence stating:

"The Court would agree with the State in many respects in that apparently by the Rivera case and this Williams case, the fact of the reliability of the witness may be established by a mere statement to that effect. But, it seems, in every one of these cases, there has been some corroboration to some extent. And, further, there appears to have been the distinction that there had been a personal observation of whatever was invoked in the case, whether it be narcotics or gambling. Whereas, here we have the distinction of personal knowledge rather than the party actually seeing anything. As I stated, although the cases, and, particularly, this Rivera case seems to indicate that further corroboration beyond the personal observation on reliability was not necessary, there was in fact some, and there seems, in fact in all of these cases, to have been some, if only minimal. But here we have no actual personal observation by these unknown informers nor do we have any corroboration that the Court can see.

"And for this reason, the motion to quash will be allowed. (Rec. 34, 35).

The People of the State of Illinois, then, pursuant to Rule 604 of the Supreme Court of Illinois, pursued an appeal in the Illinois Appellate Court. On the appeal the state contended that the credibility of the informers was shown by the fact that there were two informers and not just one informer; that both informers were said to have furnished reliable information to the affiant in the past concerning gambling matters; that they furnished their information separately, independently, which was the same information; and neither knew the identity of the other as an informer. This petitioner, as appellee, countered that the trial court had properly ruled that the search warrant improvidently issued, should be quashed and the evidence obtained as a result of its issuance suppressed, because:

(a) There was a want of basis for crediting the hearsay—and a want of corroboration of the hearsay;

(b) That the affiant lacked standing to submit a hearsay complaint upon which a valid search warrant could issue;

(c) That the citizen-affiant had no reasonable grounds for believing that the fruits, instrumentalities, or even evidence of the crime of gambling was present on the premises for which the warrant issued; and

(d) That the description of the place to be searched was insufficient.

The Illinois Appellate Court reversed the order of the trial court holding that the affidavit identified the premises as a location at which telephone bets had been placed, and

the conduct described, far from being innocent, was in itself criminal. It found the affidavit satisfied the requirement of showing that the suspect premises were frequented by known gamblers in that the petitioner was observed entering the building and was shown to have a substantial record of gambling charges. (App. 5) As to (b) above, the Illinois Appellate Court held that the fact that the affiant appeared as a private citizen and had volunteered, having no authority to investigate gambling offenses, did not affect the credibility or accuracy of the affidavit he made in that the affidavit was sufficient to establish probable cause for the issuance of the warrant, and the search was reasonable.

As to (c) and (d) above, the Illinois Appellate Court made no ruling or comment.

This petitioner then petitioned the Illinois Appellate Court to rehear his case because of the matters overlooked or misapprehended by the court, and the most salient omission being that Court's failure to require *any* showing for the affiant-complainant's asserted probable cause to believe that certain records of betting activity described in the complaint "or any evidence thereof" were on the premises searched and that the court had overlooked the argument of this petitioner to the effect that there was no showing of identity of the petitioner with the hearsay information that a Frank Aureli had numerous arrests for gambling offenses.

This Petition for Rehearing was denied Octobr 24, 1968.

A Petition for Leave to Appeal was then filed with the Supreme Court of Illinois claiming that the Illinois Ap-

pellate Court's decision should be reversed on the grounds that:

1. It authorizes the issuance of a warrant to search premises on a complaint stating no basis for believing the objects of the search will be found on such premises;

2. It authorizes and condones the issuance of a search warrant to seek evidence to justify an arrest;

3. The complaint provided no basis for satisfying the requirement that (1) the reliability of the informer has been previously established, or (2) the information is independently corroborated;

4. That under the decision, when the informant's hearsay purports to relate his own observations of personal experiences, the necessity of previously established reliability or independent corroboration is obviated; and

5. The decision stands for the proposition that corroboration of an informer of unknown reliability may be found in corresponding hearsay from a second informer of unknown reliability.

The Petition for Leave to Appeal was denied, without opinion, on January 27, 1969.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the denial of the Petition for Leave to Appeal by the Supreme Court of Illinois for the following reasons:

1. The direction of the Illinois Appellate Court to the trial court to admit evidence on trial, which direction is concurred in by the denial of Leave to Appeal by the Supreme Court of Illinois, is in direct discord with this Court's decision in *Spinelli* v. *United States,* No. 8, October term, 1968, decided January 27, 1969 (37 L.W. 4110); *Aguilar* v. *Texas,* 378 U.S. 108, 114; *Nathanson* v. *United States,* 290 U.S. 41, 47; *Byars* v. *United States,* 273 U.S. 28, 29; *Boyd* v. *United States,* 116 U.S. 616, 625, 629. All of these authorities, save *Spinelli* (decided the same day Leave to Appeal was denied) and *Byars* were urged on the State Courts, as well as were the decisions of other federal courts, but they were denied recognition.

2. This case presents a question of whether two anonymous informers may corroborate each other, without basis for believing either one. This is a federal question of constitutional dimension which has not been heretofore determined by this Court.

3. This case presents a unique question on the application of this Court's decisions, beginning with *Jones* v. *United States,* 362 U.S. 257, as to whether *any* law officer—whether or not it is his duty or jurisdiction to enforce the law asserted to be violated—may make hearsay affidavits or complaints for the purpose of securing the issuance of search warrants. In other words, may hearsay to a state officer suffice for the issuance of a federal warrant or

hearsay to a federal officer suffice for the issuance of a state warrant, when neither officer is entrusted with the enforcement of the laws allegedly violated.

I.

The complaint filed by Agent Everett of the Federal Bureau of Investigation with the Circuit Court of Cook County, Illinois, asking for the issuance of a warrant is set forth at pages 5-7 hereof.

That complaint will be examined in vain for any basis upon which Mr. Everette swore he reasonably believed that "records of racehorse bets, scratch sheets, miscellaneous gambling paraphernalia, or any evidence thereof" were to be found on the premises searched.

A reasonable ground for belief that fruits or instrumentalities of crime will be found on the premises is the very basis of the authority necessary to issue any search warrant. This Court in *Aguilar* v. *State of Texas,* 378 U.S. 108, made that point eminently clear where it stated at Page 114:

> "The magistrate must be informed of some of the underlying circumstances from which the informant concluded that *the narcotics were where he claimed they were . . .*" *Aguilar* v. *State of Texas,* 378 U.S. 108, 114. (Emphasis Ours.)

No place in the Complaint for the Search Warrant does Mr. Everette even hint the premise upon which he swore that he has "probable cause to believe" that records of racehorse bets, scratch sheets, miscellaneous gambling paraphernalia, *or any evidence thereof, ...*" were on those premises.

If what Mr. Everette wanted was an arrest warrant to issue against the petitioner, he should have asked for one. But just as an arrest may not be made as an excuse to search, neither can a search warrant issue as an excuse to arrest.

This warrant is the absolute equivalent of the obnoxious writs of assistance which authorized the examination of ships and vessels and persons found therein for the purpose of finding goods prohibited to be imported or exported, or on which the duties had not been paid; and to enter into and search any suspected vaults, cellars or warehouses for such goods. (See *Boyd* v. *United States,* 116 U.S. 616, 623.) In condemning such practice, the Supreme Court had occasion to quote James Otis and John Adams in condemnation:

> The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer." This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."
>
> *Boyd* v. *United States,* 116 U.S. 616, at 625.

That same case, reaffirmed over and again by this Court, continued later as follows:

> "It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and *it would seem that search for evidence is disallowed upon the same principle.* Then, too, the innocent would be confounded with the guilty." *Boyd* v. *United States,* 116 U.S. 616, at 629. (Emphasis Ours.)

If privacy is going to be invaded under warrant to search for fruits and instrumentalities of crime, probable cause must be shown to the magistrate that he might reasonably believe that the fruits and instrumentalities are on the premises. Whether or not the fruits and instrumentalities are in fact on the premises is immaterial as we know from so many abortive searches, but there must be a basis on which to satisfy the probable cause requirement of our State and Federal Constitutions that they will be found on the premises. That is the very nexus of the Fourth Amendment to the Constitution of the United States and Article 2, Section 6, of the Constitution of this State. This warrant issued on nothing more than Mr. Everette's belief or suspicion that contraband would be found on the premises. No authority exists for breaching the security and privacy insured under the Constitution upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances. See *Nathanson* v. *United States,* 290 U.S. 41, 47.

The very wording of the warrant, and the Complaint, the former granting authority to search and the latter praying authority to search, makes evident the Constitutional abuses. How can privacy be maintained when

authority is given to search for gambling records "or any evidence thereof"?

The sustaining of the validity of the warrant in this case strikes at the very core of constitutionally secured privacy.

As this Court said in *Byars* v. *United States,* 273 U.S. 28, at page 29:

> "The information upon which the search warrant was issued states only that affiant 'has good reason to believe and does believe the defendant has in his possession' such intoxicating liquors, instruments and materials. The warrant clearly is bad if tested by the 4th Amendment and the laws of the United States."

These principles were reaffirmed by this Court recently in *Spinelli* v. *United States,* No. 8, October Term, 1968, decided January 27, 1969.

The direction of the Illinois Appellate Court to the trial court to admit the fruits of this search on trial is absolutely contradictory of all of the above authorities and in complete disregard of this petitioner's constitutional rights.

II.

The affidavit in this case is strikingly similar to that discussed in *Spinelli* v. *United States, supra.* There this court found nothing unusual about there being two phones on a single premises. Here there was but one. Then the affiant swore to his personal observations of seeing the petitioner enter the premises on two occasions.[1]

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[1]All other references to the activities of the petitioner are reflected as having been observed, without reference to or identity of the observer. This does not reflect the source of the information or the extent of the hearsay and whether it came from the persons actually making the observations. The Illinois Appellate Court rightfully disregarded those matters.

Aside from the Federal Bureau of Investigation identification records disclosing "submission of fingerprints by the Chicago, Illinois Police Department on charges of gambling and bookmaking on June 15, 1961, November 3, 1961, January 3, 1964, January 8, 1964, November 11, 1964, and March 8, 1965."[2]

The only matter in the complaint to justify issuance of the warrant states:

> "On June 22, 1966 and July 25, 1966, two informers, who have furnished reliable information to me in the past *concerning gambling matters,* told me that they have recently called race horse bets in to Chicago telephone 889-7272 and placed their bets with a man who answered on the other end. These informers said they called this number on June 22, 1966, June 28, 1966, July 14, 1966, July 21, 1966 and July 25, 1966. These informers furnished this information separately, and neither informer knows the identity of the other as an informer."

We submit that this case comes directly within the scope of *Jones* v. *United States,* 362 U.S. 257, wherein the anonymous informer had "given information to the undersigned on previous occasions and which was correct, . . ." There too, the informer related his personal observations. This Court endorsed the information as sufficient to sustain the search warrant "so long as the informer's statement is reasonably corroborated by other matters within the officer's knowledge." In *Jones* "other sources of information" gave the same information, and the owners of the apartment admitted to the use of narcotics drugs and had previously displayed needle marks as evidence of the same.

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[2] We are not certain what "submission of fingerprints" means, but it cannot be anything more than an arrest.

The question in this cause is whether two anonymous informers can corroborate each other to the establishment of probable cause, even though both of them, delivering the information by himself, would require independent corroboration. This case presents the question of whether the *Jones* warrant would have been sustained in the absence of the personal observations of Officer Didone (362 U.S. at 267, fn. 2).

III.

In the Court below we emphasized that, in all of the cases brought to our attention concerning hearsay as the basis for the issuance of a warrant, the affiant is a peace, police, or federal officer, whose occupation it was to enforce the particular law claimed to have been violated. As in *Johnson* v. *United States,* 333 U.S. 10, the police lieutenant was on a narcotics detail and the federal agents were assigned to the Bureau of Narcotics and were experienced in narcotics work and in a position to recognize the distinctive odor of burning opium. The expertise of such persons was also considered a factor in *United States* v. *Ventresca,* 380 U.S. 102, where the Supreme Court again noticed the significance of the observations having been made by full time investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service and federal officers of the government engaged in the common investigation. All of the cases and authorities referred to concern affidavits based on hearsay, and executed by persons whose obligation it was to enforce the particular laws suspected of being violated and their acquaintance with such enforcement.

The affiant in this case was one Duncan J. Everette, who described himself as an agent of the Federal Bureau of Investigation.

The essence of his affidavit is that he had probable cause to believe that the offense of gambling was being committed. Agents of the Federal Bureau of Investigation are not charged with the enforcement of the laws against gambling. In fact, there is no federal law that prohibits gambling. There is a federal law that requires certain persons in certain types of gambling to be licensed, that is, to pay a certain Federal Occupational Tax on gambling, but the enforcement of that law—as all tax laws—is not committed to the Federal Bureau of Investigation, but to the Internal Revenue Service. Agent Everette is not charged with the enforcement of the violation which he claimed reasonable grounds for believing had occurred. In this sense the "two informants, who had furnished reliable information to me [Agent Everette] in the past concerning gambling matters . . ." is a matter of no official significance.

While a person to whom the enforcement in their individual jurisdiction is entrusted may act on hearsay proved to be reliable, there is no warrant in law for acting on the hearsay information of a person whose duty is not the enforcements of the laws of the jurisdiction wherein he seeks and obtains a warrant. In fact, the information to which the affiant adverts could not have been obtained in the course of his official capacity, and must therefore have been obtained and submitted in the capacity of a mere volunteer.

To this argument, the Appellate Court of Illinois responded:

> "The defendant also contends that the affiant Everette had no authority to investigate gambling offenses and that he appears in this case as a private citizen and a volunteer. That does not affect the

credibility or accuracy of the affidavit he made. The affidavit was sufficient to establish probable cause for the issuance of the warrant, and the search was reasonable."

This presents a question which has not been, but which should be, decided by this Court. That is, whether a person in the capacity of a private citizen and a volunteer, can obtain the issuance of a search warrant on pure hearsay, or whether the hearsay advantage is confined to the use of those officers whose jurisdiction it is to enforce the laws claimed to have been violated. This circumstance is of increasing frequency and thus of general importance to the proper administration of criminal law. We respectfully pray this Court grant review on this question.

CONCLUSION

Th Petitioner prays this court Writ of Certiorari be issued on all, or any one of, the grounds hereinabove set forth.

Respectfully submitted,

ANNA R. LAVIN
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Attorneys for Petitioner

APPENDIX

APPENDIX

No. 52221

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from The
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Cook County.
FRANK AURELI,	)	
Defendant-Appellee.	)	Hon. Jacques
	)	F. Heilingoetter

MR. JUSTICE SCHWARTZ delivered the opinion of the court.

This is an interlocutory appeal, pursuant to Supreme Court Rule 604, from an order of the trial court, quashing a search warrant and suppressing certain evidence seized pursuant to the warrant. The State contends that the affidavit on which the warrant was issued presented reasonable cause for its issuance and that the motions to quash the warrant and to suppress the evidence should have been denied. The facts follow.

Duncan J. Everette, a special agent for the Federal Bureau of Investigation and referred to herein as the affiant, filed a complaint supported by affidavit seeking a search warrant for the premises described as 6949 West Grand Avenue in Chicago, Illinois. The complaint alleged that records of race horse bets, scratch sheets, miscellaneous gambling paraphernalia and other evidence of the offense of gambling could be found and seized at that address. Everette's affidavit averred that he received information from two informers, each of whom had supplied reliable information concerning other gambling matters, and that they told of calling the Chicago telephone number 889-7272 on five different days and placing bets with the man who answered. The affidavit further alleged that the

informers furnished the information separately and without knowledge of each other's identity as an informer. He (Everette) then determined from telephone company records that the telephone number in question was that of Sam Golden of the Grand Avenue address; that he proceeded to place the building at that address under surveillance and that he personally observed the defendant entering the premises on July 15th and July 19th and again observed him in the vicinity of the building on July 25, 1966. The affidavit further recited that police records showed that the defendant had been charged with gambling and bookmaking on six different occasions. On the foregoing facts the warrant issued and the search was carried out.

The issue presented on this appeal is whether the hearsay statements contained in the affidavit are supported by sufficient underlying circumstances to merit recognition by the court as reasonable and reliable information. The court is not confined to rules of evidence such as would apply in the trial of a case nor does the law require that the affidavit allege facts sufficient to sustain a conviction. Moreover, courts are disposed to greater leniency with respect to the admission of evidence seized pursuant to a warrant than with respect to evidence seized pursuant to an arrest. *United States* v. *Ventresca,* 380 U.S. 102 (1964).

An affidavit supporting a complaint for a search warrant is not deemed insufficient because it contains hearsay statements "so long as a substantial basis for crediting the hearsay is presented." *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *United States* v. *Ventresca,* 380 U.S. 102 (1964); *Jones* v. *United States,* 362 U.S. 257 (1960). Thus probable cause for search may be based on information supplied by an informant if the reliability of the informant

has been previously established, *People* v. *Durr,* 28 Ill. 2d 308, 192 N.E. 2d 379, or independently corroborated, *People* v. *McFadden,* 32 Ill. 2d 101, 203, N.E. 2d 888.

In the instant case the affiant stated that two informers, each unknown to the other and each of whom had in the past supplied reliable information regarding gambling matters, disclosed that they had placed bets through the telephone number identified with the premises and set forth in the complaint. The affiant also stated that he had observed the defendant in or around the premises in question on July 15, July 19 and July 25, 1966, and that he had discovered from police records that the defendant had been charged with gambling and bookmaking on six occasions.

The warrant must stand or fall on the facts set forth above. The other allegations in the affidavit which relate to the defendant's itinerary to and from the Grand Avenue address are of no value since the source of the information is not specified and the allegations are prefaced only with the statement that the defendant "was observed."

Excluding the allegations referred to in the preceding paragraph, however, the facts presented by the affidavit are still sufficient to support the issuance of a search warrant. *People* v. *Williams,* (alias Kid Rivera), 36 Ill. 2d 505, 224 N.E.2d 225; *People* v. *William J. Williams,* 27 Ill. 2d 542, 190 N.E.2d 303. In both *Williams* cases, search warrants were issued on the basis of the hearsay statements of reliable informers. The informers told of witnessing and participating in dice games and horse race betting and in each case the affiant stated that the informers had supplied reliable information in the past. Although not essential to the outcome of the cases, the court observed in one case that known gamblers were seen frequenting the suspect premises and in the other case the

infromer forwarded betting slips to the affiant. In each case the court upheld the validity of the search warrant.

The defendant contends that the two *Williams* cases are not controlling and he relies on *United States* v. *Roth,* 391 F. 2d 507 (7th Cir.). In that case the informer did not advise the law enforcement authorities of his personal observations, but merely relayed information from another undisclosed source. The informer was therefore ony a conduit for the information and the reliability of the primary source could not be ascertained. It also appeared that the personal observations of the affiant and the other agent were insufficient to corroborate the information. One agent had observed in a warehouse sought to be searched boxes bearing a well known trade name similar to that of the company whose goods were charged to have been stolen. The court held that the boxes could have contained any of a wide variety of products manufactured by that company and that they did not necessarily contain the stolen merchandise which was sought. That is quite different from the case before us.

Defendant also contends that the court could not consider his previous arrest record as tending to corroborate the informers' statements and he cites *United States* v. *Mirallegro,* 387 F.2d 895 (7th Cir.). In that case there was no allegation that any person had observed the actual gambling transactions or had participated in them. The affidavit merely stated that the suspect customarily purchased a racing form and then proceeded to an apartment in an adjoining city and that he had been arrested for gambling in 1933 and in 1965. The court held (with one dissent) that the affidavit failed to establish probable cause for the issuance of the warrant.

The principal difference between the instant case and *Mirallegro, supra,* is that in *Mirallegro* neither the affiant

nor any informer observed the commission of a crime or participated therein. In that case facts which were observed and set forth in the affidavit were not in the opinion of the court sufficient to support an inference that a crime was being committed.

In the instant case the affidavit identified the premises as the location at which telephone bets had been placed, and the conduct described, far from being innocent, was in itself criminal. It was then material, under *People* v. *Williams,* 36 Ill. 2d 505, 224 N.E.2d 225. to show that the suspect premises were frequented by known gamblers. Defendant was observed entering the building and was shown to have a substantial record of gambling charges.

The defendant also contends that the affiant Everette had no authority to investigate gambling offenses and that he appears in this case as a private citizen and a volunteer. That does not affect the credibility or accuracy of the affidavit he made. The affidavit was sufficient to establish probable cause for the issuance of the warrant, and the search was reasonable.

The order is reversed and the cause is remanded with directions to admit the evidence obtained by the search upon the trial of the defendant, and for such other and further proceedings as are not inconsistent with the views herein expressed.

Order Reversed And Cause Remanded With Directions.

DEMPSEY, P.J. and SULLIVAN, J. concur.